IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 96 of 1999
With
CRIMINAL APPEAL No. 102 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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PRAVIN @ HAKLO - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Opponent(s)

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Appearance :

1. CRIMINAL APPEAL No. 96 of 1999
MR JAYESH A DAVE for Appellant(s) : 1,
MR KP RAWAL, APP for Opponent(s) : 1,

2. CRIMINAL APPEAL No. 102 of 1999
MR UTPAL M PANCHAL for Appellant(s) : 1
MR KP RAWAL, APP for Opponent(s) : 1

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 15/03/2007

COMMON ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

The incident in question occurred on 3rd October, 1992 nearabout 7.15 p.m. in the Office of Savani Diamonds, a diamond polishing factory located in Shaktidhara Colony in the Bapunagar area of Ahmedabad. At the time of the incident, it is alleged that 6 persons armed with deadly weapons like revolver, knives etc. rushed into the factory at about 7.15 p.m. on 3rd October, 1992 in furtherance of a conspiracy hatched by them to commit dacoity. After entering the office, the witnesses were asked to leave the office. However, in the process, rounds from revolvers were fired which hit one Mukeshbhai and ultimately caused his death. Resistance was offered by the witnesses and as such, the assailants ran away from the place.

1.1 Out of 6 assailants, three persons namely, Pravin @ Haklo Natvarlal Patel, Harishankar Ramkishore Sharma and Piyush Kanubhhai Pandya came to be tried by the City Sessions Court, Ahmedabad in Sessions Case No.11 of 1994. Charge against them was framed at Exh.2 for the offences punishable under Sections 120(B), 398, 302 read with 120(B), 342, 323 read with 120(B) of I.P.C. and Section 25(1)(A) of the Arms Act. The three accused

persons pleaded not guilty to the charge and came to be tried.

1.2 Considering the evidence led by the prosecution, the Trial Court came to the conclusion that charges for the offences punishable under Sections 302, 398, 452 and 342 were successfully established by the prosecution as against accused appellant no.1 – Pravin @ Haklo Natvarlal Patel.

1.3 The Trial Court found that the prosecution was successful in establishing charges against appellant no.2 – Harishankar Ramkishore Sharma for the offences punishable under Sections 120(B), 302 read with 120(B), 398, 452, 342 read with 120(B) and recorded his conviction.

1.4 However, the third accused, who is charged, absconded during the trial and his trial was separated.

2. The Trial Court sentenced accused no.1 - Pravin @ Haklo for imprisonment for life and to pay a fine of Rs.2,000/-, in default, to undergo S.I. for a period of two months for the offence of murder punishable under Section 302 of I.P.C. He was also sentenced to undergo R.I. for 7 years for the offence punishable under Section 398 of I.P.C. For the offence punishable under Section

452 of I.P.C., he was sentenced to undergo R.I. for a period of 5 years and to pay a fine of Rs.1,000/-, in default, to undergo S.I. for one month. For the offence punishable under Section 342 of I.P.C., he was sentenced to undergo R.I. for one year. The Trial Court deemed it proper not to award any separate sentence for the offence punishable under Section 120(B) of I.P.C.

2.1 Accused Harishankar Ramkishore Sharma was sentenced to undergo imprisonment for life and to pay a fine of Rs.2,000/-, in default, to undergo S.I. for two months for the offence of murder punishable under Section 302 read with 120(B) of I.P.C. He was sentenced to undergo R.I. for a period of 7 years for the offence punishable under Section 398 of I.P.C. He was also sentenced to undergo R.I. for 5 years and to pay a fine of Rs.1,000/-, in default, to undergo S.I. for one month for the offence punishable under Section 452 of I.P.C. and he was sentenced to undergo R.I. for a period of one year for the offence punishable under Section 342 of I.P.C. read with Section 120(B) of I.P.C. No separate sentence was awarded for the offence punishable under Section 120(B) of I.P.C.

3. Aggrieved by the said judgment and order, the original accused no.1 – Pravin @ Haklo Natvarlal Patel has preferred Criminal Appeal No.96 of 1999 whereas

original accused no.2 – Harishankar Ramkishore Sharma has preferred Criminal Appeal No.102 of 1999.

4. We have heard learned advocates Mr. Jayesh A. Dave and Mr. Devarshi Shah (appearing for Mr. Utpal Panchal) for the appellants so also learned APP Mr. K.P. Rawal. We have examined the record and proceedings.

5. Learned advocate Mr. Dave submitted that only two eye-witnesses to the incident have deposed before the court. They have identified the two appellants in the court and they claim to have identified the appellants in T.I. parade also. Mr. Dave submitted that T.I. parade is the main piece of evidence sought to be relied upon by the prosecution to indicate involvement of the appellants in the incident but if the evidence in respect of T.I. parade is seen, it is clear that the T.I. parade was not properly conducted. There are a number of lacunae which render the T.I. parade doubtful. It is also clear that the Executive Magistrate who conducted the T.I. parade did not take necessary precautions and, therefore, the evidence with regard to T.I. parade loses credibility.

5.1 Mr. Dave submitted that all the witnesses and the dummies are involved in diamond business. They are claimed to have been summoned at the instance of the Executive Magistrate by his peon within 10 minutes

whereas the area to which they belong (Bapunagar) is at a long distance from the area at which T.I. parade was conducted i.e. Gheekanta Magisterial Court and they could not have been summoned within a short period. It is also contended that while directing the peon to summon dummies, the Executive Magistrate did not instruct the peon to summon witnesses who would look similar to the accused. The dummies were from different age groups and there is no material to show that they were similar in appearance. All dummies are involved in diamond business so also the identifying witnesses and, therefore, the evidence as to identification in T.I. parade by the witnesses may not be attached any importance or credibility.

5.2 Mr. Dave submitted further that the arrest of accused no.1 is effected after six months when allegedly he was found to be sleeping in an open area in Bhavnagar district. The panch witnesses to the arrest panchnama are from a distance of about 60-70 kms. and they are also involved in diamond business. It is alleged that the appellant was sleeping with a revolver in his pocket which is highly improbable. There is no evidence to show as to what led the police to go to that place and what was the nature of information received by the Investigating Officer.

5.3 Mr. Dave submitted that if the Ballistic Expert's report is examined, it is clear that the revolver seized from accused no.1 Pravin @ Haklo is a country-made revolver with 0.38 calibre whereas the bullets found from the person of the deceased and the injuries found on the dead body are not attributable to a revolver with a calibre of 0.38 and, therefore, the prosecution evidence, even if taken at face value, would rule out the possibility of accused no.1 - Pravin @ Haklo having fired shot on the deceased resulting into his death.

5.4 Mr. Dave submitted further that though Pravin @ Haklo is convicted for wrongful confinement, the evidence indicates otherwise. The accusation against the appellants is that they asked the witnesses to leave the office rather than confining them to the office and, therefore, the conviction is ill-founded.

5.5 Mr. Dave submitted that in light of the above infirmities, the appeal of Pravin @ Haklo may be allowed. He may be acquitted of charges and may be set at liberty.

6. Learned advocate Mr. Devarshi Shah for Mr. Utpal Panchal for accused no.2 submitted that in the entire evidence, no allegation against accused no.2 is made by any witness. All have negated the presence of accused

no.2. There is no discovery or recovery from accused no.2 and, therefore, the only piece of evidence to connect accused no.2 with the crime is in form of identification by the witnesses before the court and at the time of T.I. parade. Mr. Shah submitted that both these pieces of evidence are weak pieces of evidence and that in the present case, the T.I. parade has not been properly conducted after taking appropriate precautions by the Executive Magistrate and no credence may be given to the evidence. He, therefore, submitted that Criminal Appeal No.102 of 1999 may be allowed. The conviction may be set aside and accused no.2 may be acquitted of charges levelled against him.

7. Learned APP Mr. Rawal submitted that the T.I. parade is conducted by the Executive Magistrate who is an independent person and will have no bias or interest one way or the other either in the prosecution or in the defence. The evidence of the Executive Magistrate supported by contemporary record in the form of 'yadi' and the T.I. parade panchnama may, therefore, be accepted at face value. Minor lapses or mistakes may not render the entire T.I. parade evidence incredible or unbelievable.

7.1 Mr. Rawal submitted further that it is true that the F.S.L. Report and the medical evidence indicate that

the bullets found from the dead body and the bullet injuries found on the dead body are not attributable to a firearm with 0.38 calibre. However, a cartridge of 0.38 calibre has been found from the place of incident which is opined to have been fired from the revolver seized from accused no.1 and, therefore, involvement of accused no.1 in the incident is established and he would be responsible vicariously for the act of his accomplice who may have fired the fatal shot on the deceased. He, therefore, submitted that both the appeals may be dismissed.

8. Having gone through the record and proceedings and keeping in light the contentions raised by learned advocate for the parties and learned APP, we find that two eye-witnesses to the incident have been examined by the prosecution namely, p.w.1 – Vinubhai Popatlal (Exh.34) and p.w.2 – Sujeetkumar Hemendrabhai (Exh.40) to prove the incident. The witnesses did not know the assailants before the incident and, therefore, the name of the assailants is not divulged in the F.I.R. To connect the accused as the assailants, the prosecution has relied on depositions of these two witnesses so also the T.I. Parade and deposition of the Executive Magistrate – Udesing Karsanbhai Vaghela (Exh.43).

8.1 As per the case of p.w.1 and p.w.2, they had

identified both accused no.1 and accused no.2 at the time of Test Identification Parade conducted by the Executive Magistrate. These two witnesses also identified accused no.1 and accused no.2 in the court as the assailants. They identified accused no.1 as the person who opened fire on deceased Mukeshbhai and caused his death.

8.2 If the evidence in this regard is seen, we find that the test identification parade suffers from various infirmities.

8.2.1 The Executive Magistrate states that he had summoned the dummies through his peon but there is no evidence to show that the Executive Magistrate instructed the peon to bring dummies of a specific description which would be similar to that of accused persons. It is a basic requirement that dummies are to be so selected that their appearance would have close resemblance to that of accused persons sought to be identified by the witnesses. The Executive Magistrate, therefore, seems to have not taken proper precautions while conducting the T.I. parade.

8.2.2 It also appears that the dummies appeared before the Executive Magistrate within 10 minutes of his asking the peon to bring the dummies. All dummies except one are engaged in diamond business in which the witnesses

were also engaged. Likewise, all except one hail from Bapunagar area to which the witnesses belong and as such, there is the possibility of those dummies having known the deceased prior to the holding of T.I. parade.

8.2.3 The dummies could not have been before the Executive Magistrate within 10 minutes if they were to come from Bapunagar because of the distance between Bapunagar and Gheekanta area of Ahmedabad where the office of the Executive Magistrate is located.

8.2.4 There is also an inconsistency about the time of holding of T.I. parade. All three – the two witnesses and the Executive Magistrate, give different timing so far as holding of T.I. parade is concerned.

8.3 When we find that the T.I. parade suffers from a large number of infirmities, when we find that the Executive Magistrate failed in taking due precautions, in our opinion, it would be risky to rely on such a T.I. parade. Even otherwise, T.I. Parade is basically meant for Investigating Officer to assure the Investigating Officer that he is proceeding in the right direction. Reference can be had to **STATE OF MAHARASHTRA vs. SURESH [2000 SCC (Cri.) 263]**.

8.4 We find that the officer conducting the T.I.

parade failed in taking precautions to ensure that the object of the parade is achieved and permitted dilution of the modality to be followed in a parade and, therefore, in our considered view, not much credence can be given to the evidence of T.I. parade. Even otherwise, this identification parade has been held to be not a substantive evidence **[ABDUL WAHEED KHAN alias WAHEED & ORS. vs. STATE OF A.P. (2005 SCC(Cri.) 1301)].**

8.5 The second part of evidence led by the prosecution is in form of identification of accused no.1 and accused no.2 in the court. This type of evidence has been held to be a weak piece of evidence and, therefore, the court ordinarily should look for other supportive material. We have seen that such other material in form of T.I. Parade does not inspire our confidence. It is also worth a note that the incident occurred on 3rd October, 1992. The T.I. Parade was conducted on 16th March, 1993 and the deposition of p.w.1 and 2 were recorded on 21st May, 1996 and 22nd May, 1996 respectively. And the identification before court is after a lapse of about 43 months. We, therefore, deem it expedient not to blindly accept the evidence of p.w.1 and 2 but to examine whether the prosecution has been able to lead any other piece of evidence to establish the identity of accused no.1 or accused no.2 as the assailants.

9. In this regard, we find that both accused no.1 and accused no.2 were arrested from Bhavnagar district while they were sleeping in the foot of Kshetranjay mountain and when they were apprehended, accused no.1 was found to be having a country-made revolver with him of 0.38 calibre whereas a dagger was recovered from accused no.2.

9.1 It has also come on record that cartridge of 0.38 calibre has been recovered from the place of incident and it has been certified by Ballistic Expert of F.S.L. to be the cartridge fired from the revolver seized from the accused no.1. In this set of circumstances, presence and involvement of accused no.1 in the incident can be said to have been properly established by the prosecution. In our opinion, the fact that accused no.1 was arrested after about six months would pale into insignificance in such a situation coupled with the fact that accused no.1 is identified by p.w.1 and 2 in court.

9.1.1 Contention that the revolver was sent to F.S.L. after a lapse of about a month also would pale into insignificance once it is found to have been received by F.S.L. with seals intact. Therefore, we are of the opinion that the prosecution is successful in establishing involvement of accused no.1 in the incident.

9.2 Now the case against accused no.1, as emerging from the evidence of eye-witnesses, is that he opened fire on the deceased with his revolver and caused injury to the deceased which ultimately resulted into his death. This aspect, we are afraid, we cannot accept. It is the prosecution evidence itself which disproves the case of the eye-witnesses that accused no.1 fired bullets on the deceased from his gun. For this purpose, evidence in the form of reports of Ballistic Expert at Exhs.59 and 71 are relevant. These reports of the Ballistic Expert indicate that the bullet which was found from the dead body of the deceased was of a different calibre than 0.38 calibre which is the calibre of the revolver of accused no.1. There were two bullet entry injuries on the dead body which are of same size. One bullet is found embedded in body but the other bullet is not found because the bullet took exit from the back. Fact, however, remains that both the bullet entry wounds are of same size meaning thereby that both were fired by a weapon other than the one used by accused no.1. It, therefore, cannot be accepted that accused no.1 caused death of the deceased. Accused no.1, therefore, cannot be convicted for the offence of murder punishable under Section 302 of I.P.C.

9.3 We may now examine the contention by learned APP that death occurred; may be by firearm of another

assailant; but when accused no.1 was in company of those persons and opened fire simultaneously, accused no.1 may be convicted for the offence of murder by employing Section 34 of I.P.C.

9.4 We may observe that even as per the prosecution case, the assailants had hatched a conspiracy to commit robbery and, there was no conspiracy or common intention of causing death of the deceased. Death of the deceased is caused during the transaction of commission of robbery on account of what happened on the spur of the moment. It has come in evidence that the room in which the incident occurred is a small cabin and that the accused no.1 was at a very close range from the deceased and, therefore, had he the intention to cause death of the deceased, his bullet could not have missed the target and would have easily caused death of the deceased. The fact that the cabin is small and the bullets were fired at a very close range establish the fact that there were soot marks on the dead body at the entry point of the bullet injury. Therefore, is is risky to infer that accused no.1 had shared a common intention of causing death of the deceased. There was hardly any time at the time of the incident to share a common intention. Accused no.1 has not fired the gun in a manner which would hit the deceased and he did not know that other assailants will fire bullet at the deceased and cause his death. It is,

therefore, not possible for us to accept the contention of learned APP to convict accused no.1 for death of the deceased by employing Section 34 of I.P.C.

10. It has come in evidence that the assailants, on arrival at the spot, asked the witnesses to leave the room. There is no evidence whatsoever to show that any attempt was made to confine them to any place and, therefore, in our opinion, conviction under Section 342 of I.P.C. could not have been recorded by the Trial Court in respect of either accused no.1 or accused no.2.

10.1 We are, therefore, of an opinion that the Trial Court committed an error in recording conviction of accused no.1 so far as it relates to the offence of murder punishable under Section 302 of I.P.C. and for the offence of wrongful confinement punishable under Section 342 of I.P.C. and that conviction deserves to be set aside. However, considering the role alleged to have been played by accused no.1, the Trial Court was justified in recording his conviction under Section 398 of I.P.C. Presence of accused no.1 is established on the spot and by virtue of recovery of cartridge from the spot belonging to his gun and, therefore, he can be said to have been involved in an attempt to commit robbery while being armed with deadly weapon like revolver and even used it and, therefore, the conviction and sentences

under Section 398 of I.P.C. deserves confirmation.

10.2 Likewise, it has come in evidence in respect of accused no.1 that accused no.1 alongwith others committed a trespass while armed with a revolver and he, therefore, can be said to have made preparation to cause hurt, assault or wrongful restrain and, therefore, he has been rightly convicted under Section 452 of I.P.C. and, therefore, that conviction also deserves to be confirmed.

11. Now, coming to the case of accused no.2 (appellant in Criminal Appeal No.102 of 1999), the only evidence against him is in the form of T.I. parade, identification in the court and recovery of a dagger. As discussed above, the T.I. parade does not inspire any confidence and, therefore, it cannot be utilised against accused no.2 either. Neither of the eye-witnesses attribute any active role to accused no.2 except that they identified accused no.2 in the court. The dagger which is recovered from accused no.2 at the time of his arrest did not bear any blood marks nor is there any evidence to show that the dagger was used by him in commission of the crime. Only piece of evidence against accused no.2 is in form of identification by p.w.1 and p.w.2 before court after about 43 months of incident. No other material is found to lend support to this version of p.w.1 and p.w.2. In this set of circumstances, when

we find that the evidence on T.I. parade is not worth giving credence, we deem it not proper or risky to rely on the sole piece of evidence in the form of identification before the court. In our opinion, therefore, the conviction of accused no.2 recorded by the Trial Court deserves to be set aside. We are, therefore, inclined to accept Criminal Appeal No.102 of 1999 and to partly accept Criminal Appeal No.96 of 1999.

12. Criminal Appeal No.96 of 1999 is partly allowed. The conviction of accused no.1 – Pravin @ Haklo Natvarlal Patel under Section 302 of I.P.C. and Section 342 of I.P.C. is hereby set aside. The conviction of accused no.1 under Sections 398 and 452 of I.P.C. is confirmed with sentences.

12.1 Criminal Appeal No.102 of 1999 is allowed. The accused no.2 – Harishankar Ramkishore Sharma is given benefit of doubt and is acquitted of charges for which he came to be convicted by the Trial Court. He be set at liberty forthwith, if not required in any other case. Fine, if paid, be refunded to him.

(A.L. Dave, J.)

(Bankim N. Mehta, J.)

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